BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Second Amended Accusation Against: LARRY AUSTIN LEATHAM, PH.D. 11463 Clinton Bar Road P.O. Box 254 Pine Grove, CA 95665 Psychologist No. PSY-11651 Respondent.	Case No. W-271 OAH No. N2004040394

DECISION AFTER NONADOPTION

Ann Elizabeth Sarli, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on January 24, through January 26, 2005.

Stephen M. Boreman, Deputy Attorney General, represented the complainant.

Hubbard & Ebert LLP, by Julian J. Hubbard, esq., represented respondent Larry Austin Leatham.

Evidence was received. The matter was submitted and the record closed on January 26, 2005.

The California Board of Psychology ("board") declined to adopt the Proposed Decision and issued on May 16, 2005, a Notice of Nonadoption of Proposed Decision. Written argument being received by respondent, the entire record, including the transcript and exhibits of said hearing, having been read and considered by the Board along with presentation of oral argument, pursuant to Government Code Section 11517, the Board hereby makes the following decision and order:

PROCEDURAL FINDINGS

1. On May 29, 1990, the Board of Psychology (Board) issued psychologist license number PSY 11651 to Larry A. Leatham.

2. On February 18, 2004, Thomas S. O'Connor, Executive Officer, Board of Psychology, Department of Consumer Affairs of the State of California, made and filed an Accusation in his official capacity. A First Amended Accusation was filed on July 28, 2004. A Second Amended Accusation was filed on December 27, 2004. At hearing, the Second Amended Accusation was amended in the following particulars: page 9 line 6 was amended to change paragraph "8" to paragraph "9". The Second Amended Accusation was further amended to add the phrase "or evaluatee" after the word "patient" wherever the word "patient" appears in the Second Amended Accusation.

3. Respondent timely filed a Request for Hearing pursuant to Government Code sections 11504 and 11509. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et. seq.

FACTUAL FINDINGS

Respondent's Background and Current Practice

1. Respondent received his Bachelor's degree in Psychology and Anthropology from Utah State University in 1973. He earned a Doctorate in Psychology in 1980 from the California School of Professional Psychology (now affiliated with California Sate University Fresno). He worked as a clinical psychologist with the United States Air Force for three years, where one of his duties was to conduct psychological evaluations of personnel.

In 1990, respondent had a family practice in Amador County. In addition to seeing patients privately, respondent performed psychological evaluations for Amador County Courts and public agencies. In this capacity, he performed child custody evaluations and conservatorship evaluations at the direction of the courts, child abuse evaluations for the Children's Protective Services, competency evaluations for the Public Defender's Office, and evaluations of parolees and inmates for the California Department of Corrections. He also performed other types of evaluations, such as fitness for duty evaluations.

In 2003, respondent took a position at Mule Creek Prison in Ione as a staff psychologist.

Allegation Re: K.A.

2. In 1997, the Amador County Court asked respondent to perform an evaluation in a custody dispute involving K.A.'s children. In connection with that evaluation,

respondent reviewed videotape and audiotape K.A. made of her interactions with her children. After reviewing these materials, respondent formed the opinion that K.A. was abusing her children. As a mandated reporter, respondent made a report to Children's Protective Services. He testified at a custody proceeding that the children were being abused and tortured by K.A. The judge assigned to the matter changed custody to the children's father.

3. K.A. began a campaign against respondent and others involved in the custody dispute, which continues to this day. K.A. filed multiple lawsuits against all of the public agencies and individuals involved in the custody decision. She published portions of the transcript of respondent's testimony at the custody hearing. She held press conferences, started organizations, and created web sites. The web sites tell K.A.'s custody story and are devoted to "exposing illegal corruption" and "exposing illegal and immoral practices in the courts." K.A. attended conferences on family law matters and spoke about her custody case and the role respondent and others played in the placement of her children. In 2001, the International Conference on Family Violence included K.A. in a panel discussion, during which she discussed her custody case.

K.A. and her supporters began a campaign of harassment against respondent and others. They followed respondent, made threats against him, and spit on him. He had to be escorted to court by sheriff's deputies because K.A. and her followers would create a "gauntlet" when he went to court. They shouted threats including: "you don't deserve to live," "you are the anti-Christ," and "you are going to die". They tried various maneuvers to prevent him from doing psychological evaluations. They played the radio into his answering machine so that he could not receive messages. They printed flyers and business cards lambasting him and accusing him of being in league with the devil. On one occasion, K.A. and a group of purported reporters with video cameras came to his home and attempted to "interview" him about K.A.'s case. Respondent found it impossible to conduct his practice in Amador County, and ultimately closed it and took his current position with the State Department of Corrections.

4. In 2002, K.A. filed a complaint with the Board of Psychology against respondent alleging professional incompetence in how he conducted the child custody evaluation. The Board prepared an Accusation, which was withdrawn when respondent agreed to an educational review. K.A. filed a petition with the Superior Court alleging that the discipline against respondent was inadequate. The Superior Court found K.A. did not have standing to seek writ relief.

5. On July 31, 2002, respondent was looking through his mail and noticed a flyer announcing that the upcoming International Conference on Family Violence was to take place on September 23, through September 28, 2002. Coincidentally, at the time he was reading the flyer, a friend called and pointed out that the flyer indicated that K.A. was an invited speaker scheduled to present. Respondent also noticed that Dr. Robert Geffner was director of this conference. Dr. Geffner was the president of respondent's alma mater.

Respondent testified that he was disheartened that his alma mater was co-sponsoring K.A. as a speaker. He was appalled that his alma mater would have K.A. on a panel on family violence when she had "horribly tortured and abused" her children and had only supervised visitation for eight years. He was upset and worried about whether Dr. Geffner was aware of her background. Respondent called Dr. Geffner, whom he did not know, and was advised Dr. Geffner was unavailable. Respondent left a message with Dr. Geffner's assistant, Andrew Jones. Respondent told Mr. Jones that he was an alumni of the California School of Professional Psychology and was calling to warn Dr. Geffner about K.A. Respondent stated that he was calling to give Dr. Geffner "a heads up to let him know who was going to be at this conference he was sponsoring."

Respondent told Mr. Jones that K.A. is a "paranoid sociopath" and that "she will say anything, whether it is the truth or not." [1] He told Mr. Jones that "K.A. has filed many civil cases, up to 24 volumes, against [him], seeking sums up to several million dollars." Respondent went on to say that K.A. "had been through 12 different judges in six years." Respondent stated that K.A. had threatened his life numerous times and called him the anti – Christ, and that he had a concealed weapons permit because of her. Respondent told Mr. Jones that K.A. had threatened the lives of others.

Respondent told Mr. Jones that K.A. had videotaped herself torturing and sexually abusing each of her children individually. He stated that he, the father, and the court had a copy of the videotape.

Respondent told Mr. Jones that K.A.. had been"5150'd with multiple Tarasoff warnings." Mr. Jones did not know what this meant; respondent explained to him that she had been found to be a danger to others or gravely disabled and had made threats against others.

Respondent told Mr. Jones that Rita Saenz, another panelist, had withdrawn from the panel when she found out that K.A. was a participant. Respondent recommended that Dr. Geffner should call Rita Saenz about the matter.

Violations of the Standard of Practice re K.A.

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[1] Mr. Jones' declaration states that respondent told him K.A. was a paranoid schizophrenic. Respondent testified he used the phrase "paranoid sociopath". Respondent's evidence is more persuasive on this point for several reasons: Mr. Johns is a lay person who may have misunderstood respondent; the evidence suggests that Mr. Jones's declaration was prepared by K.A. and may be inaccurate because of her bias or interpretation; and respondent's testimony makes clear that he does not believe K.A. is schizophrenic, but he believes that she is a sociopath, with no regard for the welfare of others.

6. Alan Karbelnig, Ph.D., testified as to the standard of practice applicable to confidentiality of evaluations and evaluatees. Dr. Karbelnig has an extensive and impressive background as a psychologist and a forensic evaluator. He received a Doctorate from the Southern California Psychoanalytic Institute in the Psychoanalytic Training Program in 1996. In 1986, he earned a Doctorate in psychology from the University of Southern California. He is currently pursuing board certification in forensic psychology. He has practiced approximately 25 years in intensive individual psychotherapy, with 10 to 15 years of practice in forensics.

Dr. Karbelnig testified persuasively that the conversation respondent had with Mr. Jones was an extreme departure from the standard of care. He testified that respondent was grossly negligent in three respects.

A. Respondent's action constituted a breach of K.A.'s confidentiality. Business and Professions Code section 2918, mandates that confidential relations and communications between psychologist and client are privileged. The Ethical Principles and Code of Conduct published by the American Psychological Association (Ethics Code) was adopted by the Board of Psychology through Business and Professions Code section 2936, and California Code of Regulations, section 1396, et seq. Section 5.02 requires that psychologists keep information acquired in their professional relationships confidential and maintain that confidentiality. Ethics Code section 5.03, subdivision (a), mandates that psychologists, in their work or reports, only disclose information germane to the purpose for which the communication is made. Ethics Code section 5.05, offers specific guidelines for when psychologists can release information regarding their patients. Respondent's telephone call to Dr. Geffner met none of these requirements.

B. Respondent's actions constituted a misuse of his power and influence as a psychologist under Ethics Code sections 1.15, 1.12, and 1.14. Section 1.15 reads as follows: "Because psychologist's scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence." Rather than guarding against these influences, respondent was reacting to his personal motivations when making the call to Dr. Geffner.

C. In his telephone call to Dr. Geffner's office, respondent inappropriately offered a psychiatric diagnosis without having examined K.A. in the preceding six years. He told Mr. Jones that K.A. was a paranoid sociopath. He supported this diagnosis with a description of her harmful conduct to her children and others and with statements concerning her lack of conscience. The standard of practice is that psychologists may not offer diagnostic impressions of anyone who they have not clinically evaluated in a temporally appropriate fashion. Section 2.01 of the Ethics Code provides in pertinent part that psychologists perform evaluations only within the context of a defined professional relationship and their diagnostic impressions are based on information and techniques sufficient to provide appropriate substantiation of their findings.

Respondent's Defenses re K.A.

7. Respondent testified that in contacting Dr. Geffner's office, he did not intend to provide Dr. Geffner with a clinical diagnosis for K.A. However, respondent's testimony established that he did intend to provide a clinical diagnosis. He testified that he told Mr. Johns that K.A. was a "paranoid sociopath." He explained to Mr. Jones that "she [K.A.] had no shame and no conscience and abuses her children to this day."

A psychologist who labels an individual a paranoid sociopath and elaborates by identifying essential features of the condition, like lack of conscience and shame, is affixing a psychiatric label to the individual. Moreover, the Diagnostic and Statistical Manual IV considers paranoia a clinical diagnosis. And, respondent intended Dr. Geffner to understand the mental condition he ascribed to K.A. Respondent testified, "I figured if Geffner was a competent psychologist he would know what I was talking about."

8. Respondent testified that in contacting Dr. Geffner's office, he did not intend to issue a Tarasoff warning "to anyone at the end of the [telephone] line." Nevertheless, respondent's attorney repeatedly characterized his telephone call as a Tarasoff warning. *Tarasoff v. Regents of University of California* (1976) 13 Cal. 3d 425, and its progeny hold that psychologists and other mental health professionals owe a duty to third parties to use reasonable care where they have knowledge that a patient is going to harm the third party. The duty is to warn the threatened party of impending danger or threats of impending danger.

Respondent testified that he believed that K.A. was a danger to others, as well as herself, because she would "say or do anything." However, he acknowledged that the only real danger K.A. posed was to respondent's own reputation, and possibly to the pocketbooks and reputations of others she might ultimately decide to sue. Moreover, to respondent's knowledge, K.A. had made no threat to harm anyone at the conference or associated with the conference. Respondent in fact had had no communication with K.A. for close to six years and was in no position to know her intentions. In short, there was no danger to an identifiable victim, to whom respondent owed a duty to issue a Tarasoff warning..

9. Respondent took the position at hearing that he did not violate any duty of confidentiality toward K.A. He argued that K.A. was an "evaluatee" or "examinee" and not a patient. Thus, he owed her no duty of confidentiality. He also argued that even if he had a duty of confidentiality to an evaluatee, he did not owe K.A. this duty because participants in court ordered custody evaluations waive confidentiality of the evaluation.

Respondent's relationship with K.A. was a professional one, whether she was an evaluatee or a patient. There is little distinction in the duty owed a patient and the duty owed a person undergoing an evaluation. Both are consumers of psychological services and both are entitled to confidentiality. Confidential information regarding the evaluatee or examinee may be disclosed to those authorities who ordered the evaluation (e.g. court ordered evaluations) or to those interested persons the examinee authorizes disclosure (e.g. employers in fitness for duty evaluations). However, confidential information may not be

released to the public simply because a person was examined or evaluated, rather than provided therapeutic services.

The fact that K.A., in consenting to a custody evaluation, signed a waiver of confidentiality did not provide respondent with license to release information about K.A. to the public. K.A.'s waiver applied to the use of the evaluation in legitimate custody proceedings.

Respondent argued that K.A. waived any confidentiality rights she may have had when she published all aspects of the custody dispute in her numerous legal pleadings, court appearances, websites, conferences and media contacts. Respondent is confusing his professional duties as a licensed psychologist with the civil law of defamation. The law of defamation provides defenses to suit to those who disclose the truth and to those who disclose information already in the public arena. Psychologists do not have license to disclose confidential information gleaned from professional relationships even if the information is true or is already in the public arena.

Finally, respondent argued that he was defending himself against K.A.'s relentless attacks by releasing the facts about her. This argument lacks merit. Respondent's disclosures were not made in the course of defending litigation against him, but were made to the public at large and were made offensively, not defensively.

Allegation re: Board's Request for J.C.'s Records

10. In September of 2001, J.C.'s employer, Amador County Unified School District (District) retained respondent to evaluate J.C.'s fitness for duty. The District prepared a release form entitled "Consent To Release Psychological Report", which it forwarded to respondent with the request for evaluation. The District's cover letter stated "Please find release of information forms attached. Ms. Cain will need to sign the Consent To Release Psychological Report unless you have another form you prefer to use." On September 21, 2001, J.C. executed the Consent To Release Psychological Report at respondent's office. Respondent maintained the release was in J.C.'s file.

11. On October 24, 2003, Thomas Campbell, a Medical Board Senior Investigator acting on behalf of the Board of Psychology, sent a letter to respondent via certified mail. The letter stated that the Board was reviewing the quality of care provided to J.C. and requested that respondent forward a copy of J.C.'s record. Mr. Campbell enclosed release forms; an Authorization for Release of Patient Health Information, executed by J.C. on October 2, 2003, and an Authorization for Release of Confidential Information, executed by J.C. on July 17, 2003. The signatures on the District release J.C. executed in respondent's office and those signatures appearing on the Board's releases were identical.

12. The Authorization For Release of Patient Health Information that Mr. Campbell sent to respondent on October 24, 2003, contained a note stating that it was a violation of section 2225.5, of the Medical Practice Act to fail to provide the requested

records within 15 days of receipt of the request. Although respondent received delivery of Mr. Campbell's letter and the signed releases, he did not forward J.C.'s records to Mr. Campbell. Nor did he communicate with Mr. Campbell about any rationale he may have had for not responding to the request.

13. On December 3, 2003, Mr. Campbell again wrote to respondent requesting J.C.'s medical records. Mr. Campbell's certified letter memorialized that he had sent an October 24, 2003, letter, and that respondent had received the letter on November 6, 2003. Mr. Campbell's letter set forth the language of Business and Professions Code section 2225.5, subdivision (a)(1), and enclosed another copy of J.C.'s release. The letter advised respondent that he had until December 15, 2003, to provide the records along with a written explanation as to the delay in providing the records. Respondent signed for the certified documents on December 5, 2003. He did not forward J.C.'s records to Mr. Campbell. Nor did he communicate with Mr. Campbell about any rationale he may have had for not responding to the request.

14. On January 8, 2004, Mr. Campbell again sent a certified letter to respondent stating that he had sent two previous letters requesting J.C.'s records. He stated "To date, I have not received your records pertaining to [J.C.] nor any communication from you justifying a delay in producing your records." He noted that the language of Business and Professions Code section 2225.5, subdivision (a)(1), which he had previously cited pertained only to physicians. He set forth the identical language of Business and Professions Code section 2969, subdivision (a)(1), which pertains to psychologists. He advised respondent that he had to provide J.C.'s records and a written explanation for the delay no later than January 15, 2004, or the Board would take steps to enforce the penalty provided by that section. The letter was sent to respondent via certified mail.

15. During the period Mr. Campbell was attempting to get J.C.'s records from respondent, J.C.'s counsel was attempting to get the same records from respondent. Respondent resisted that records request as well, claiming that J.C.'s release was not sufficient and that he required a release from the District. On January 8, 2004, Jeffrey Olson mailed a letter to respondent stating in part: "To the extent that you believe that you need written authorizations from the Amador County Unified School District to release records relative to your evaluation of [J.C.] that was requested by the school district, please consider this as such written authorization. I am the attorney representing the school district and have authority to make this authorization." Mr. Olson indicated on the letter that a copy of the letter was sent to Barbara Murray at the District.

16. Thus, on January 8, 2004, respondent had been mailed both Mr. Campbell's letter giving him until January 15, 2004, to produce J.C.'s records as well as a release signed by J.C., and a letter from the District counsel authorizing release of J.C.'s records. Mr. Campbell, on January 8, 2004, had also written to respondent's counsel matter, Julian Hubbard, advising of the difficulties he was having getting J.C.'s records from respondent. Nevertheless, respondent did not produce the records nor communicate with Mr. Campbell regarding any reason for delay.

17. On February 23, 2004, Tom Campbell and another Board investigator conducted an interview of respondent with Mr. Hubbard present. Mr. Campbell advised respondent and Mr. Hubbard that he had sent a "couple of our requests" for J.C.'s documents and had not received them. Mr. Hubbard represented that the records were ready to be delivered but that there was a problem with production of the records in that the authorization provided by J.C. did not include the school district. He stated there may also be a "privilege problem" with the other District employees whose written statements are contained in the file." Mr. Hubbard stated that he had a January 8, 2004, letter from the District counsel who "seems to be partially aware of the multi-party nature of this privilege." Mr. Hubbard stated that he was not satisfied with the District's release. He felt it permitted release in the "context of J.C.'s civil suit." He stated that respondent "has the documents ready and would be happy to ship them out to you," but for these issues.

18. The day after the interview, February 24, 2004, Mr. Hubbard wrote to Mr. Olson responding to Mr. Olson's January 8, 2004, letter releasing J.C.'s records. He wrote that he did not believe the District release pertained to the Medical Board and that he needed Olson's authorization to release J.C.'s records to the Medical Board. He advised that respondent was protecting the rights of the client as well as third parties who submitted information in the J.C. evaluation. Mr. Olson responded with a letter on February 27, 2004, stating that the District's January 8, 2004, release pertained to the Board's request for materials relative to J.C.'s complaint filed with the Board against respondent. On March 22, 2004, respondent released J.C.'s records to the Board.

Respondent's Assertion of Good Cause for Delay in Release of J.C.'s Records

19. Complainant asserts that respondent should have produced J.C.'s records by January 15, 2004. This date is the deadline Mr. Campbell gave respondent for production in his January 8, 2004, letter. On January 8, 2004, respondent had a release signed by J.C. and one signed by counsel for his institutional client, the District.

Respondent asserted that he had good cause for not producing J.C.'s records until March 22, 2004. He asserted that he had many legitimate concerns that were not fully satisfied until he released the records approximately fifteen days after he had Mr. Olson's February 27, 2004, letter in hand. He cited initial concerns that the signature on J.C.'s release may not have been hers. This "concern" was baseless, given his knowledge she had filed a lawsuit and a complaint with the Board and given his possession of the release she signed when the evaluation was conducted. He could simply have compared signatures if he had any doubts. The signatures on the two releases were identical.

Respondent's next obstacle to producing J.C.'s records was his conviction that his client was the District, and not J.C. That concern should have been allayed when he received the district's January 8, 2004, release of records pertaining to J.C.'s evaluation. However, he testified that he was unsure that this release was legitimate because anyone could have downloaded the attorney's letter-head from the internet. Further, he did not know whether an

attorney purporting to represent the district could release records for the district. These are not rational concerns that would rise to the level of just cause for ignoring the Board's repeated requests for medical records. A professional, who seriously entertained these doubts about the legitimacy of a release, would simply call the district personnel, with whom he regularly did business, to confirm that the attorney was who he said he was and had the authority he claimed to have.

Respondent's next concern was the privacy of other district employees, whose written observations of J.C. were included in the materials the district sent him. At hearing he professed concern that he might require releases from these persons, whom he had never met or spoken with in connection with his evaluation of J.C. However, he had made no effort to share these concerns with the Board, the employees, or the District, or to implement other remedies such as redacting the names of the employees.

Respondent's contentions that he had legitimate concerns about releasing J.C.'s records were severely undermined by his utter unresponsiveness to the Board. Simply put, if a prudent psychologist had a legitimate reason for delaying production of records, he would have so advised Mr. Campbell. Mr. Campbell began requesting J.C.'s records, and an explanation for delays, in late October of 2003. It was not until four months later, in the interview of February 23, 2004, that any explanation was offered. The explanation offered was vague and unfounded. The inference may be drawn that the explanation was concocted to cover the unjustified delay. Mr. Hubbard's letter to Mr. Olson the day after the interview appears designed to cover respondent's delinquency. Mr. Hubbard did not contact Mr. Olson after he received the January 8, 2004, release letter, to advise him he felt it was incomplete. Instead, he waited until after the interview, when he understood the Board was filing an Accusation against his client, to raise "critical" issues about the January 8, 2004, release letter.

Finally, respondent offered no explanation for why, if his records were ready to be mailed to the Board on February 23, 2004, as his attorney represented, it took forty-five days from the District's February 27, 2004, letter to produce them to the Board.

Violations of the Standard of Practice re Release of J.C.'s Records

20. Dr. Karbelnig testified as to the standard of practice applicable to production of records. Dr. Karbelnig testified that respondent should initially have provided the Board with a written explanation as to his reasons for delaying the release of the records.

Dr. Karbelnig based his opinion on the Ethics Code. Section 1.02 requires psychologists to make it overtly clear whenever there is a conflict between legal and ethical responsibilities. Section 1.24 requires that psychologists disseminate records and data in accordance with the law. Business and Professions Code section 2969 subdivision (a)(1) requires release within 15 days of receiving the request and authorization. Pursuant to that section, respondent should have produced J.C.'s records within 15 days after receiving Mr. Olson's January 8, 2004, letter.

Dr. Karblnig testified that when respondent received a release from Mr. Olson, dated January 8, 2004, he should have released the records immediately. Mr. Campbell had given him until January 15, 2004, to release the records and it would have been the standard of practice to produce them by that date. Although the standard of care would have been to produce the records immediately upon receipt of the District's release, the statutory penalties accrue 15 days after receipt of the request and authorization for release. Thus, by January 12, 2004, at the latest when allowing time for mailing, respondent would have the Board's request, J.C.'s authorization to release, and the District's authorization to release. Thus, he had 15 days from January 12, 2004, (not from January 8, 2004) to release the records. Thus, the statutory penalties began accruing on January 28, 2004, and continued until March 22, 2004, when the records were produced, a total of 54 days.

Allegation Re: Fitness for Duty Evaluation of J.C.

21. Respondent assessed J.C.'s fitness for duty three times during the period of September of 2001, through February 24, 2003. The District's Director of Personnel, Patty Knobelauch, requested that respondent determine whether J.C. had a mental impairment as defined by the Americans with Disabilities Act (ADA). If she had an impairment, respondent was to determine whether the impairment limited one or more of her major life activities as defined by the ADA, whether she could perform the essential functions of her position as a Senior Office Clerk, and whether her continuing to work in a school setting posed a "direct threat" of harm to herself or others, as that term was defined under the ADA. If J.C.'s continued employment did pose a direct threat of harm to herself or others, respondent was asked to describe any type of position which would not pose such a direct threat.

Ms. Knobelauch forwarded documents and notes regarding observations of J.C.'s behavior on duty from December 15, 1998, through September of 2001. These "informational attachments," in the words of Ms. Knobelauch, consisted of J.C.'s multiple crying episodes while at work in the Transportation Department, and her threat to commit suicide in the Transportation Department.

22. Respondent's initial report was dated October 3, 2001. Respondent opined that J.C. suffered from a mental impairment as defined by the ADA. He provided an Axis II diagnosis of Obsessive-Compulsive Personality Disorder of mild to moderate severity. He found under the ADA definition of "essential functions" that she was not psychologically fit to work. He recommended she seek the services of a licensed mental health professional and be evaluated by a psychiatrist for appropriate medication.

After receiving the report, Ms. Knobelauch requested that respondent state whether there was any accommodation that would enable J.C. to perform the essential functions of her job. Respondent prepared an addendum, dated October 22, 2001. The addendum stated that there were several accommodations that could be made to assist J.C. in "possibly performing the essential functions of her job." He wrote, "if she sought psychiatric services,

she could be afforded time off for travel to and treatment by a psychiatrist or a family physician who could prescribe psychotropic medications after a psychiatric evaluation." He also wrote that, if she sought the services of a licensed mental health professional, she could be accommodated by allowing her to attend therapy and by restricting the number and complexity of the tasks required for her job."

On October 23, 2001, respondent faxed the addendum to Ms. Knobelauch. He included the note, "Hi Patty, Any comments, additions, deletions, suggestions would be appreciated. I'll have my typist finalize it tonight & get it to you tomorrow." Ms. Knobelauch reviewed the October 22, 2001, addendum and on October 25, 2001, she faxed respondent a note stating, "Will this work ?" and included a page of typed language stating the following:

"You have asked me to address an additional question:

1. Given her current disability, is there some accommodation, which would allow [J.C.] Cain to perform the essential functions of her job?

Until [J.C.] has worked with a trained Mental Health Professional there are no accommodations at this time. It may be possible, after she has participated in some treatments, to be able to work with some level of accommodation(s). I would recommend that the person who works with her would be in a better position to advise you regarding possible accommodations."

Respondent incorporated this language into an Addendum, dated October 26, 2001. He stated that there were no accommodations at this time, with the exception of those he set forth in his October 22, 2001, addendum.

23. Respondent's second report was dated December 11, 2001. Respondent noted that he completed a reassessment of J.C.'s fitness for duty. In connection with his review, he read a December 6, 2001, letter from J.C.'s clinical psychologist, Carolyn Sauer, Psy.D. Dr. Sauer had written to state that she had been counseling J.C. weekly since November 12, 2001, and that J.C. was depressed and anxious, allegedly as a result of work conditions. She noted that J.C. was ready and anxious to return to work immediately. She advised continued counseling for at least three months, with some flexibility in her work schedule to allow for this.

Respondent noted in this second report that J.C. had a moderate to high risk of relapse. He recommended psychiatric evaluation for a medication evaluation, noting that there were medications that could help her in stabilize her mood and assist her in feeling more confident and in control of her emotional state. He noted that he informed J.C. that a psychiatrist may not agree with his opinion and may not prescribe medication.

Respondent also recommended that J.C. continue to meet with Dr. Sauer on a weekly basis for a minimum of six months. He stated that he made this recommendation for several

reasons, "to have weekly monitoring of J.C.'s emotional status by her therapist to ensure and stabilize any gains made by J.C. as she reenters her work environment, and to assist J.C. in her struggles with her developmental years and how she was parented." Respondent recommended that J.C. return to work during the Christmas break, "to step back into her work without the distractions of other employees and the bus drivers." He noted that after she had worked during the Christmas break, if her mental status warrants it he would recommend she return to work when school resumed after January 1, 2002.

24. Respondent's final evaluation report was dated January 24, 2003. He opined that J.C. suffered from a mental impairment as defined by the ADA; Obsessive Compulsive Personality Disorder (DSM:IV-301.4) of moderate severity. It was his opinion that her general mental status had deteriorated since his last evaluation. He wrote that J.C.'s narcissistic and histrionic traits had increased and were contributing to her presenting difficulties. It was his opinion that her mental status was rigid and fragile and she was at risk for deterioration if she returned to work at that time. He opined that "an accommodation to transfer to another job/environment could result in her mental status deteriorating."

Respondent recommended that J.C. not return to her job in the District's transportation department. He recommended an accommodation of allowing her time off from her duties to obtain mental health service. She had stopped seeing Dr. Sauer after two or three months and did not obtain a psychiatric evaluation. He recommended that she receive counseling for a minimum of eighteen months, to include group therapy. He recommended she be evaluated by a psychiatrist for possible medications. He noted that after she had obtained mental health services for a substantial period of time other accommodations may be possible.

Violations of the Standard of Practice in J.C.'s Evaluations

25. Dr. Karbelnig established the standard of practice in conducting mental status examinations. The Ethics Code, section 1.04, mandates that psychologists display competence in their areas of work. Section 1.05 requires psychologists to maintain their expertise. Section 2.02 requires psychologists have competence in the appropriate use of assessments. That section reads in pertinent part, "When interpreting assessment results, including automated interpretations, psychologists take into account the various test factors and characteristics of the person being assessed that might affect psychologists' judgments or reduce the accuracy of their interpretations." Section 7.02, subdivision (a) reads: "Psychologists' forensic assessments, recommendations, and reports are based on information and techniques including personal interviews of the individual, when appropriate sufficient to provide appropriate substantiation for their findings." Section 7.04 provides that "In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions."

26. Dr. Karbelnig testified persuasively that there were a number of serious deficiencies in respondent's evaluations and that these deficiencies as a whole rose to the

level of an extreme departure from the standard of care. These deficiencies constituted gross negligence.

It is the standard of practice that an evaluator conducting a comprehensive psychological evaluation collects information from a variety of sources and synthesizes and integrates the data. At the outset, respondent failed to note the dates he examined J.C. in any of the reports he authored, save the last one. Respondent failed to consult with an obvious and vital source of data, J.C.'s psychotherapist, Dr. Sauer, when preparing his December 11, 2002, and January 24, 2003, reports. He did not include Dr. Sauer's report in his references to collateral sources. He did not include the comments of two of her treating physicians, Drs. Hall and Martin, who wrote that she was fit for work.

Respondent also failed to integrate the results of the two diagnostic tests he administered, the Minnesota Multiphasic Personality Inventory – II (MMPI) and the Millon Clinical Multiaxial Inventory-III (Millon). In his initial report of October 3, 2001, respondent stated that his review of the test results from the MMPI were within normal limits, with no scales elevated above a "T score of 65." This score indicates no personality disorder. The results of the Millon were reported on Axis II (enduring personality traits), and were reported as obsessive compulsive personality disorder with histrionic personality features.

Even though the MMPI indicated no personality disorder and the Millon indicated a personality disorder, respondent did not reconcile or acknowledge the differences between the two results in his reports. He, instead, disregarded the MMPI results. He based his opinion that J.C. was unfit for duty due to mental illness on the Millon only. He ultimately found her unable to work, without psychiatric intervention, psychotropic medication, and long term counseling, based solely on the Millon results. He did not document that he considered any Axis I condition such as Major Depressive Disorder, which might be amenable to treatment, or any alternative diagnosis.

In the preparation of his reports, respondent did not consider or advance a Axis I diagnosis, even though there were strong indications during all J.C.'s interviews and in the District's notes that she was depressed and anxious and had contemplated suicide. Respondent testified at hearing that he did not offer an Axis I diagnosis because he was hesitant to "label" people, implying a stigma would attach to the patient. He was not credible. The diagnosis of depression or anxiety on Axis I would not have stigmatized J.C. Respondent knew that J.C.'s employer and fellow employees had all observed her continuous crying and anxiety. Her employer had witnessed her threat to commit suicide. Respondent commented that she cried to such an extent he could not interview her on her first visit and he had difficulty administering tests to her on a subsequent visit. Respondent testified at hearing that "any competent psychiatrist could tell she was depressed." Moreover, respondent was not hesitant to "label" J.C. with "obsessive compulsive personality disorder with histrionic personality features" on Axis II, even though this is an enduring diagnosis which could stigmatize J.C.

In his first and third reports to the District, respondent quoted extensively from the computer generated interpretations of the Millon test results. His diagnostic impressions and conclusions followed directly from the computerized test interpretation. There was no integration of MMPI results, mental status observations, or supporting information, such as J.C.'s display of obsessive – compulsive features observed in the course of the evaluations.

Finally, in respondent's initial report, he found that J.C. suffered a mental impairment, but he found that she could return to work with accommodations for counseling and psychiatric evaluation. However, in his final report of January 24, 2003, he recommended that she not return to her current job due to emotional fragility, emotional and psychological vulnerability, and problems with boundaries. He found that she was at a higher risk than an average individual of harming herself because of the nature and fragility of her mental status and past history. He based these conclusions solely on her continuing complaints about her workplace and the scores on the Millon, which he interpreted as showing that her narcissistic and histrionic personality traits had increased. Specifically, he found she had intense needs for recognition and admiration, over identified with her job, personalized what was said and done by others and distrusted the motives of others.

Dr. Karbelnig also opined that it was inappropriate and an extreme departure from the standard of practice for respondent to ask the District to review his October 22, 2001, addendum and make any comments, additions, deletions, or suggestions. Dr. Karbelnig opined that respondent's competence in forming objective independent opinions was undermined by his asking the referral source to make revisions or additions to his report.

27. Dr. Karbelnig opined that the recommendations for treatment which respondent made for J.C., counseling and psychiatric evaluation, were objective and fair and were within the standard of practice. However, respondent's evaluations, when viewed in totality, created an inadequate work product, which may have damaged J.C. by causing her to be removed her from her job unnecessarily. The work and the work product comprising the evaluations were grossly negligent.

Respondent's Defenses re J.C.'s Fitness for Duty Evaluation

28. Respondent testified essentially that his evaluation of J.C. was correct and within the standard of practice. He testified that in connection with J.C.'s evaluations, he had received much information from the District about her job performance. She had been with the District for many years, but had had many different jobs within the District. He believed that her problems finally manifested in the transportation department. He testified that "she had shown maladaptive ways of ..being in the world" prior to her difficulties with the transportation department.

Respondent relied upon this information in writing his evaluations of J.C. However, he did not note any of this information, or the fact he had relied upon it as true, in his evaluations. This failure to integrate data into his evaluation is the crux of the Board's

complaint. Whether J.C. was fit to work under the ADA is not at issue; respondent's failure to conduct a competent evaluation is the inquiry.

Respondent denied quoting large sections of computerized interpretations in his evaluations. His denial was not persuasive. Dr. Karbelnig's opinion on the origin of respondent's language was more persuasive. He has read hundreds of computerized interpretations and recognized the language respondent used. Moreover, a lay reading of the language at issue shows that the language is too generalized to be specific to J.C. It is intended to be tailored to an individual patient, by the evaluating psychologist.

Respondent argued that it was not below the standard of practice to quote portions of computerized interpretations of Millon tests in his evaluations. He maintained that his evaluations were appropriately designed to show the reader the basis for the diagnosis. Respondent missed the point. The evaluations fell below the standard of care, not because they quoted large portions of generalized computerized interpretations, but because this generalized language was the sole information respondent considered and reported in his evaluations.

Factors in Justification Aggravation Mitigation and Rehabilitation

29. In order to determine whether and to what extent it is appropriate to discipline respondent's license, it is necessary to weigh and balance respondent's conduct in light of any factors in justification, aggravation, mitigation and rehabilitation.

There are no factors in justification.

In respect to respondent's telephone call to Dr. Robert Geffner, there is some evidence of mitigation. Respondent had been subjected to numerous lawsuits and personal attacks as well as threats and invasions of his privacy. His judgment in making the telephone call was clouded by his anger toward K.A. and his fear of further public attacks on his character.

In respect to respondent's withholding of J.C.'s records from Board investigators, there is some mitigation in that respondent acted, in part, on advice from counsel.

In respect to the fitness for duty evaluation of J.C. there were no factors of mitigation in evidence.

There was no evidence of aggravating circumstances.

Respondent chose not to introduce evidence of rehabilitation. Rather, he elected to defend his telephone call to Dr. Geffner with untenable legal arguments. Likewise, he defended his failure to produce J.C's medical records with untenable legal arguments. He did not acknowledge that J.C.'s evaluations were deficient in any respect. Respondent's lack of insight and understanding as to how his actions constituted unprofessional conduct

warrants imposition of a practice monitor during the first two years of his probation period to protect the public. If respondent had consulted more experienced licensees and not acted in such an independent manner, he may have been able to avoid the actions that lead to the filing of these complaints against his license.

Costs

30. At hearing, the parties were advised that the Administrative Law Judge would take evidence relating to the factors set forth in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32. The parties were advised that these factors would be considered in determining the reasonableness of costs. These factors include: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

Respondent declined to present evidence relating to the factors identified in *Zuckerman.* Although he offered many defenses to the Accusation, he did not raise a colorable challenge to the Accusation. Moreover, respondent's defenses contain no credible evidence that he had a subjective good faith belief in the merits of his position, which led him to oppose the charges.

Complainant established that the reasonable costs of investigation and prosecution of this matter were $20,154.75. Complainant established that the scope of the investigation was appropriate to the alleged misconduct. Complainant prevailed on all of the charges. Respondent introduced no evidence regarding his ability to pay costs.

Civil Penalty

31. Complainant seeks a civil penalty of $1,000 per day pursuant to Business and Professions Code section 2969, subdivision (a) (1). As set forth above, penalties under the statute began accruing on January 28, 2004, and ran until J.C.'s records were produced on March 22, 2004, for a total of 54 days. The civil penalty is thus $54,000. Respondent did not demonstrate good cause for his failure to produce J.C.'s records after January 27, 2004.

LEGAL CONCLUSIONS

1. Business and Professions Code section 2969, subdivision (a)(1), provides:

> A licensee who fails or refuses to comply with a request for the medical records of a patient, that is accompanied by that patient's written authorization for release of records to the board, within 15 days of receiving the request and authorization, shall pay to the board a civil penalty of one thousand dollars ($1,000) per day for each day

that the documents have not been produced after the 15th day, unless the licensee is unable to provide the documents within this time period for good cause.

As set forth in Factual Findings 10 through 20, inclusive, it was established by clear and convincing evidence that respondent violated Business and Professions Code section 2969, subdivision (a)(1), in respect to J.C.'s medical records.

As set forth in Factual Findings 10 through 20, inclusive, and in Factual Finding 31, it was established by clear and convincing evidence that respondent is subject to a civil penalty in the amount of $54,000, for violation of this section.

2. Business and Professions Code section 2960, provides in pertinent part that the Board may suspend or revoke the license of any licensee who is guilty of unprofessional conduct. Pursuant to subdivision (k), unprofessional conduct shall include violating any of the provisions of this chapter or regulations duly adopted there under. As set forth in Legal Conclusion 1, and in Factual Findings 10 through 20, inclusive, and in Factual Finding 31, it was established by clear and convincing evidence that respondent violated this section.

3. Business and Professions Code section 2960, subdivision (j), provides in pertinent part that it is unprofessional conduct for a psychologist to be grossly negligent in the practice of his or her profession.

As set forth in Factual Findings 2 through 9, inclusive, it was established by clear and convincing evidence that respondent violated Business and Professions Code section 2960, subdivision (j), in respect to his telephone conversation with Mr. Jones about K.A.

4. Business and Professions Code section 2936, provides in pertinent part that the Board shall establish as its standards of ethical conduct relating to the practice of psychology, the code of ethics adopted and published by the American Psychological Association (APA). Those standards shall be applied by the Board as its accepted standard of care in all licensing examination development and in all board enforcement policies and disciplinary evaluations. APA Ethical Standards 5.01, 5.02, and 5.03, prohibit the improper disclosure of confidential information.

As set forth in Factual Findings 2 through 9, inclusive, and Legal Conclusion 3, it was established by clear and convincing evidence that respondent violated Business and Professions Code section 2936 and APA Ethical Standards 5.01, 5.02, and 5.03, in respect to his telephone conversation with Mr. Jones about K.A.

5. As set forth in Factual Findings 21 through 28, inclusive, it was established by clear and convincing evidence that respondent violated Business and Professions Code section 2960, subdivision (j), in respect to his fitness for duty evaluation of J.C.

6. As set forth in Factual Finding 30, the Declaration of Costs supports an award of reasonable costs of investigation and enforcement of disciplinary proceedings under Business and Professions Code section 125.3 and California Code of Regulation, title 16, section 317.5 and California Code of Regulation, title 1, section 1042 subdivision (b)(3), in the amount of $20,154.75.

7. As set forth in Factual Finding 31, it was established by clear and convincing evidence that respondent violated Business and Professions Codes section 2969, subdivision (a)(1), and that the civil penalty assessed under that statute is $54,000.

ORDER

1. Psychologist Number PSY 11651 issued to respondent Larry Austin Leatham is revoked. However, the revocation is stayed and respondent is placed on probation for five (5) years upon the following terms and conditions:

Educational Review

Respondent shall submit to an educational review concerning the circumstances which resulted in this administrative action. The educational review shall be conducted by a board-appointed expert case reviewer and/or Board designee familiar with this case. Educational reviews are informational only and intended to benefit Respondent's practice by preventing future complaints. Respondent shall pay all costs associated with this educational review.

Coursework

Respondent shall take and successfully complete, not less than forty hours of coursework each year of probation in the following area(s), ethics, confidentiality, assessment and evaluation and other coursework designated by the Board. Coursework must be pre-approved by the Board or its designee. All coursework shall be taken at the graduate level at an accredited educational institution or by an approved continuing education provider. Classroom attendance is specifically required; correspondence or home study coursework shall not count toward meeting this requirement. The coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this Decision, respondent shall submit to the Board or its designee for its prior approval a plan for meeting the educational requirements. All costs of the coursework shall be paid by the respondent.

Ethics Course

Within 90 days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval a course in laws and ethics as they relate to the practice of psychology. Said course must be successfully completed at an accredited educational institution or through a provider approved by the Board's accreditation agency for continuing

education credit. Said course must be taken and completed within one year from the effective date of this Decision. The cost associated with the law and ethics course shall be paid by the respondent.

Investigation/Enforcement Cost Recovery

Respondent shall pay to the Board its costs of investigation and enforcement in the amount of $20,154.75, within the first two years of probation. Such costs shall be payable to the Board of Psychology or its designee, in such manner as the Board may determine. Failure to pay such costs shall be considered a violation of probation. The filing of bankruptcy by respondent shall not relieve respondent of the responsibility to repay investigation and enforcement costs.

Probation Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Board of Psychology at the end of each fiscal year (July 1 - June 30). Failure to pay such costs shall be considered a violation of probation. The filing of bankruptcy by respondent shall not relieve respondent of the responsibility to repay probation monitoring costs.

Civil Penalty

Respondent shall pay to the Board the civil penalty of $54,000, in periodic payments to be determined by the Board or its designee, within the first 55 months of probation. Such civil penalty shall be payable to the Board of Psychology. Failure to pay such civil penalty shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of the responsibility to pay said civil penalty.

Obey All Laws

Respondent shall obey all federal, state, and local laws and all regulations governing the practice of psychology in California including the ethical guidelines of the American Psychological Association. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board or its designee in writing within seventy-two (72) hours of occurrence.

Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board or its designee, stating whether there has been compliance with all the conditions of probation.

successfully terminated. Future registrations or licensure shall not be approved, however, until respondent is currently in compliance with all of the terms and conditions of probation.

Practice Monitor-Two Years in Duration Subject to Tolling Provision

Within 90 days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval, the name and qualifications of a psychologist who has agreed to serve as a practice monitor. The monitor shall 1) be a California-licensed psychologist with a clear and current license; 2) have no prior business, professional, personal or other relationship with respondent; and 3) not be the same person as respondent's therapist. The monitor's education and experience shall be in the same field of practice as that of the respondent.

Once approved, the monitor shall submit to the Board or its designee a plan by which respondent's practice shall be monitored. Monitoring shall consist of a least one hour per week of individual face to face meetings and shall continue for two years during the probationary period. The respondent shall provide the monitor with a copy of this Decision and access to respondent's patient records. Respondent shall obtain any necessary patient releases to enable the monitor to review records and to make direct contact with patients. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request. It shall be respondent's responsibility to assure that the monitor submits written reports to the Board or its designee on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance.

Respondent shall notify all current and potential patients of any term or condition of probation that will affect their therapy or the confidentiality of their records (such as this condition, which requires a practice monitor). Such notifications shall be signed by each patient prior to continuing or commencing treatment.

If the monitor quits or is otherwise no longer available, respondent shall obtain approval from the Board for a new monitor within 30 days. If no new monitor is approved within 30 days, respondent shall not practice until a new monitor has been approved by the Board or its designee. During this period of non-practice, probation will be tolled and will not commence again until the period of non-practice is completed. Respondent shall pay all costs associated with this monitoring requirement. Failure to pay these costs shall be considered a violation of probation.

Violation of Probation

If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No Petition for

Modification or Termination of Probation shall be considered while there is an Accusation or Petition to Revoke Probation pending against respondent.

Completion of Probation

Upon successful completion of probation, respondent's license shall be fully restored.

2. Respondent shall pay to the Board the civil penalty of $54,000, on terms set forth in the terms and conditions of probation.

3. Respondent shall pay to the Board the costs of investigation and prosecution of this matter in the sum of $20,154.75, on terms set forth in the terms and conditions of probation.

ORDER

IT IS SO ORDERED.

The effective date of this Decision After Nonadoption is October 13, 2005.

Dated: September 13, 2005.

Jacqueline B. Horn, Ph.D.

Jacqueline B .Horn, Ph.D.
President, Board of Psychology